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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sierra)

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAUN SCOTT RUPERT,

Defendant and Appellant.

C045133

(Super. Ct. Nos.
CR00279X & CR00326X)

Shaun Scott Rupert, committed to the California Rehabilitation Center (CRC) following imposition (with execution suspended) of a prison term of three years and eight months, argues that the court abused its discretion in imposing an upper term, consecutive sentence. For the reasons stated below, we conclude that no abuse of discretion occurred. Therefore, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Sierra County Sheriff's deputies and emergency medical personnel responded to a call concerning a laceration of defendant's wrist on the evening of June 4, 2001. According to Mark Brown, the Paramedic Director of the Sierra Valley District Hospital, sheriff's dispatch asked him to wait until law enforcement had secured the scene. While he was waiting, a woman approached Brown and told him he would not be in danger if he examined defendant, who was 18 years old at the time. Brown acquiesced and was escorted down an alley, where he saw two young men holding down defendant. Brown decided to return to his ambulance and wait for law enforcement.

Sheriff's Deputy Joseph Moseley was the first officer to arrive on the scene. As he approached defendant, the woman related that defendant had tried to kill himself and had run away, but that the two men holding defendant down had managed to pursue and tackle him. The woman was upset that Moseley was going to arrest defendant. Moseley, who seemed to know defendant, assured the woman that he was there to help.

As Moseley looked at the laceration on defendant's arm, defendant broke free from restraint and kicked the officer in the knee, bending it backwards, and causing Moseley to stumble back in great pain. Moseley recovered and again approached defendant, asking why he had done that. Defendant responded that he wanted to die and then kicked Moseley in the lower abdomen, which again caused Moseley to recoil.

With the assistance of Brown and the two young men, Moseley

placed defendant in the back of his patrol car, but not before defendant had kicked and head butted all four of them. After arriving at a sheriff's substation, Moseley, who was barely able to get out of his car, went inside to tend to his injuries. As he reached the door, two backup officers arrived just in time to subdue defendant, who had broken free from his restraints and was attempting to break the back window of Moseley's patrol car.

Brown obtained approval for medical sedation and injected defendant with a five milligram dose of Valium, which seemed to calm him. Brown checked on Moseley, who was vomiting into a trash can. Brown had his emergency medical technician run a medical check on Moseley, after which he started an intravenous drip. Brown then returned to defendant, who was attempting to bite the wound on his arm and kick out the window of the patrol car.

With the assistance of the backup officers, Brown administered a second five-milligram dose of Valium while defendant head-butted and attempted to bite Brown. After checking on Moseley again, Brown returned to defendant, who was kicking and screaming "worse than ever." Brown informed the officer in charge that both defendant and Moseley required immediate emergency medical assistance. The officer agreed and the two patients were transported to a hospital. After arriving, Moseley was taken to the emergency room. Brown and the two backup officers then struggled with defendant for 20 minutes while attempting to restrain him on an emergency room stretcher.

As a result of this incident, defendant was charged in Sierra County case No. CR00326 (case No. CR00326) with battery on an emergency medical technician engaged in the performance of his duties (Pen. Code, § 243, subd. (c)(1)¹ - count I), assault on a peace officer engaged in the performance of his duties (§ 241, subd. (b) - count II), assault on an emergency medical technician engaged in the performance of his duties (*id.*, - count III), assault with a deadly weapon (§ 245, subd. (a)(1) - count IV), resisting arrest (§ 148(a)(1) - count V), and battery on a peace officer engaged in the performance of his duties (§ 243, subd. (b) - count VI). It was further alleged that the offenses occurred while defendant was released on bail on his own recognizance in Sierra County case No. CR00279 (case No. CR00279), within the meaning of section 12022.1.

In case No. CR00279, defendant had been charged with two counts of furnishing or selling methamphetamine (Health & Saf. Code, § 11379, subd (a) - counts I & II), selling, furnishing, or giving away marijuana (*id.*, § 11360, subd. (a) - count III), possession of methamphetamine (*id.*, § 11377, subd. (a) - count IV), and being under the influence of a controlled substance (*id.*, § 11550, subd. (a) - count V).

Pursuant to a negotiated plea, defendant pled no contest to counts I and VI in case No. CR00326 and to one count of possession of methamphetamine (§ 11377, subd. (a)) in case No.

¹ Further unspecified statutory references are to the Penal Code.

CR00279 in exchange for dismissal of the remaining counts. It was agreed the maximum term of imprisonment would be three years and eight months. The court suspended imposition of sentence and placed defendant on probation for three years. The court noted that it was "a very close call" between probation and prison, but granted probation because the crimes were committed in the midst of a mental health crisis and that the circumstances favoring probation outweighed those against it. As one of the conditions of probation, defendant was ordered to complete a 90-day residential drug and alcohol treatment program.

Defendant had difficulty abiding by the terms and conditions of probation, resulting in three petitions to revoke probation, the ultimate revocation of same in November 2002, and the present appeal.

The first petition to revoke probation (filed in October 2001) was based on defendant's expulsion from the residential drug treatment program. The court found a "technical" violation of probation, but reinstated probation on condition defendant serve nine days in jail, attend weekly Alcoholics Anonymous (AA)/Narcotics Anonymous (NA) meetings, and undertake six months of outpatient treatment with a substance abuse counselor.

A second petition to revoke probation was filed in November 2002 (hereafter, the second petition) based on defendant's failure to prove he had attended required AA/NA meetings or to pay restitution. The court summarily revoked probation, continued the dispositional hearing, and released defendant on

his own recognizance on condition that he pay restitution and provide proof of AA/NA meeting attendance.

In January 2003, defendant's probation officer submitted an interim report noting that defendant had failed to attend the AA/NA meetings, pay restitution, or notify the probation department that he had obtained a prescription for medicinal marijuana.

A third petition to revoke defendant's probation was filed six months later, in June 2003, because defendant had committed an assault and battery (§§ 240, 242) and willfully injured or tampered with a vehicle (Veh. Code, § 10852). Defendant admitted he had vandalized a vehicle. The court reinstated probation on condition, inter alia, that defendant serve seven days in jail.

Defendant was thereafter sentenced to prison based on the revocation of probation on the second petition. In case No. CR00326, the court imposed the upper term of three years on count I, with a consecutive eight-month term on count VI (erroneously referred to as count IV in the order of commitment filed Sept. 26, 2003). A concurrent jail term of one year was imposed on the single conviction in case No. CR00279. The court suspended execution of sentence and committed defendant to CRC.

DISCUSSION

Defendant argues that the court abused its discretion in sentencing him to the upper term. He notes that the victims suffered minimal injuries and, that when the court originally granted him probation, it found the factors supporting the grant

of probation were "a very close call." In defendant's view, "[i]t is not reasonable for [defendant], in addition to receiving felony treatment for two batteries, one of which produced virtually no injury, to additionally receive the upper term for crimes he committed at age 18 during a volatile mental breakdown during which he tried to kill himself. [Defendant's] brief history of juvenile crime and this one isolated incident of kicking cannot reasonably outweigh considerations of his youth, mental status, and the less serious nature of the crimes in comparison to others of the same class. There is no reasonable basis for imposing a sentence above the mid term."

Sentencing courts have wide discretion in weighing the aggravating and mitigating factors enumerated in the California Rules of Court, and the appellate court does not substitute its judgment on such matters. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582; *People v. Calderon* (1993) 20 Cal.App.4th 82, 87.) The trial court's process of weighing those factors "involves a flexible quantitative and qualitative analysis, not a rigid numerical approach." (*People v. Thornton* (1985) 167 Cal.App.3d 72, 77; *People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) A single aggravating factor is sufficient to impose an aggravated sentence where the aggravating factor outweighs the cumulative effect of all mitigating factors, justifying the upper prison term when viewed in light of the general sentencing objectives stated in California Rules of Court, rule 4.410, i.e., protecting society, punishing the defendant, deterring defendant and others from criminal conduct, and achieving

uniformity in sentencing. (*People v. Nevill* (1985) 167 Cal.App.3d 198, 202; see also *People v. Osband* (1996) 13 Cal.4th 622, 728.) In addition, the court may "minimize or even entirely disregard mitigating factors without stating its reasons." (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813).

"The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

The court imposed the upper term basing its finding of five circumstances in aggravation: the crime involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness, or callousness; defendant has engaged in violent conduct which indicates a serious danger to society; defendant's prior convictions as an adult or sustained juvenile delinquency proceedings are numerous or of increasing seriousness; defendant was on probation or parole at the time the offenses were committed; and defendant's prior performance on probation or parole was unsatisfactory.

In mitigation, the court found that the defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some

other reason not amounting to a defense, and that defendant voluntarily acknowledged wrongdoing at an early stage of the proceedings.

The court concluded the circumstances in aggravation outweighed those in mitigation and thus imposed the upper term on count I in case No. CR00326. The court imposed a consecutive sentence on count VI in the same case because the crimes involved separate acts of violence.

Defendant's argument is nothing more than an attempt to reargue the significance of the various sentencing factors in order to obtain a more favorable disposition on appeal. As the foregoing authorities demonstrate, it has not been our function to entertain such requests. Rather, we uphold the trial court's findings if supported by substantial evidence and its sentence if supported by the findings. To the extent that defendant's argument may be construed as an attack on the evidentiary findings of the superior court, it must fail. Mark Brown's letter to the court detailed the circumstances of the offense and provided a factual predicate for the court's evidentiary findings. Defendant violently assaulted six individuals, four of whom - Moseley, Brown and the two backup officers - were attempting to help him in the performance of their professional duties. According to Brown, defendant was the most violent patient he had treated during his career as a paramedic. While it is true, as defendant notes, that Officer Moseley did not submit a statement for sentencing, Brown's description of defendant's assaultive conduct remedied this evidentiary

deficit. In addition, on the date of the offenses, defendant was on probation for a violation of section 261.5, unlawful sexual intercourse with a female under the age of 18.

We are also unpersuaded by defendant's suggestion that the court abused its discretion in imposing the upper term because it had previously concluded, in connection with the initial grant of probation, that the circumstances relative to that determination were evenly balanced. "[S]ection 1203.2, subdivision (c) provides that on revocation of probation the court may 'pronounce judgment for any time within the longest period for which the person might have been sentenced. . . .' Thus, a convicted person once found worthy of probation may later be found deserving of an aggravated prison term - even though the court must make the choice of prison terms based on the same facts available at the time of the granting of probation, under [California Rules of Court,] rule 435(b)(1) [now rule 4.435]. [Citation.]" (*People v. Morado* (1990) 221 Cal.App.3d 890, 894-895.) In sum, the court did not abuse its discretion in sentencing defendant.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

DAVIS, J.

RAYE, J.